



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R03-OAR-2012-0280; FRL- 9724-8]

Approval and Promulgation of Implementation Plans; Virginia; Revisions to the State Implementation Plan Approved by EPA through Letter Notice Actions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule; administrative change.

SUMMARY: EPA is taking final action on administrative changes to the Virginia State Implementation Plan (SIP). The changes consist of revised regulatory citations found in Virginia's regulations pertaining to municipal solid waste landfills and open burning which EPA previously approved through a Letter Notice. EPA has determined that this action falls under the "good cause" exemption in the Administrative Procedure Act (APA). This exemption in the APA authorizes agencies to dispense with public participation and to make an action effective immediately, thereby avoiding the 30-day delayed effective date otherwise provided for in the APA.

DATES: This action is effective [insert Federal Register publication date].

ADDRESSES: EPA has established a docket for this action under Docket ID Number **EPA-R03-OAR-2012-0280**. All documents in the docket are listed in the www.regulations.gov website. Although listed in the electronic docket, some information is not publicly available, i.e., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are

available either electronically through www.regulations.gov or in hard copy for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 1650 Arch Street, Philadelphia, Pennsylvania 19103. Copies of the State submittal are available at the Virginia Department of Environmental Quality, 629 East Main Street, Richmond, Virginia 23219.

FOR FURTHER INFORMATION CONTACT: Harold A. Frankford at (215) 814-2108, or by email at frankford.harold@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” or “our” refer to EPA.

I. What is being addressed in this document?

EPA is taking final action on administrative changes to the Virginia SIP. On March 16, 2012, Virginia submitted a SIP revision which revises regulatory citations found in Regulations 9VAC5 Chapter 40, Part I, Article 43 (Municipal Solid Waste Landfills) and Chapter 130, Part I (Regulation for Open Burning). The amended text changes those citations which cross-reference Virginia’s current Solid Waste Management Regulations (9VAC5-20-81). The affected SIP-approved regulations are sections 5-40-5810, 5-40-5820, 5-40-5850, 5-40-5880, 5-40-5920, 5-130-20, and 5-130-40. EPA has determined that the revisions are minor SIP changes without any substantive changes, and that they comply with all applicable requirements of the CAA and EPA regulations concerning such SIP revisions. EPA approved these revisions through a Letter Notice to the Virginia Department of Environmental Quality (VADEQ) dated June 1, 2012 consistent with the procedures outlined in both EPA’s Notice of Procedural Changes on SIP processing published on January 19, 1989 at 54 FR 2214 and a memorandum dated April 6, 2011

entitled “Regional Consistency for the Administrative Requirements of State Implementation Plan Submittals and the Use of Letter Notices” from Janet McCabe, Deputy Assistant Administrator for the Office of Air and Radiation to the EPA Regional Administrators.

II. What action is EPA taking?

Today’s action merely codifies in 40 CFR 52.2420(c) the administrative amendments approved by EPA through its June 1, 2012 Letter Notice to VADEQ. EPA has determined that this action falls under the “good cause” exemption in section 553(b)(3)(B) of the Administrative Procedure Act (APA). This exemption authorizes agencies to dispense with public participation and section 553(d)(3) which allows an agency to make an action effective immediately, thereby avoiding the 30-day delayed effective date otherwise provided for in the APA. With respect to the SIP revision described above, today’s administrative action simply codifies provisions which are already in effect as a matter of law in Federal and approved state programs. Under section 553 of the APA, an agency may find good cause where procedures are “impractical, unnecessary, or contrary to the public interest.” Public comment for this administrative action is “unnecessary” because the revisions are administrative and non-substantive in nature. Immediate notice of this action in the Federal Register benefits the public by providing the public notice of the updated Virginia SIP. Approval of these revisions will ensure consistency between state and Federally-approved rules. EPA has determined that these changes will not relax the SIP or adversely impact air emissions.

III. General Information Pertaining to SIP Submittals from the Commonwealth of Virginia

In 1995, Virginia adopted legislation that provides, subject to certain conditions, for an environmental assessment (audit) “privilege” for voluntary compliance evaluations performed by

a regulated entity. The legislation further addresses the relative burden of proof for parties either asserting the privilege or seeking disclosure of documents for which the privilege is claimed.

Virginia's legislation also provides, subject to certain conditions, for a penalty waiver for violations of environmental laws when a regulated entity discovers such violations pursuant to a voluntary compliance evaluation and voluntarily discloses such violations to the Commonwealth and takes prompt and appropriate measures to remedy the violations. Virginia's Voluntary Environmental Assessment Privilege Law, Va. Code Sec. 10.1-1198, provides a privilege that protects from disclosure documents and information about the content of those documents that are the product of a voluntary environmental assessment. The Privilege Law does not extend to documents or information that: (1) are generated or developed before the commencement of a voluntary environmental assessment; (2) are prepared independently of the assessment process; (3) demonstrate a clear, imminent and substantial danger to the public health or environment; or (4) are required by law.

On January 12, 1998, the Commonwealth of Virginia Office of the Attorney General provided a legal opinion that states that the Privilege Law, Va. Code § 10.1-1198, precludes granting a privilege to documents and information "required by law," including documents and information "required by Federal law to maintain program delegation, authorization or approval," since Virginia must "enforce Federally authorized environmental programs in a manner that is no less stringent than their Federal counterparts. . . ." The opinion concludes that "[r]egarding § 10.1-1198, therefore, documents or other information needed for civil or criminal enforcement under one of these programs could not be privileged because such documents and information are essential to pursuing enforcement in a manner required by Federal law to maintain program delegation, authorization or approval." Virginia's Immunity law, Va. Code Sec. 10.1-1199,

provides that “[t]o the extent consistent with requirements imposed by Federal law,” any person making a voluntary disclosure of information to a state agency regarding a violation of an environmental statute, regulation, permit, or administrative order is granted immunity from administrative or civil penalty. The Attorney General's January 12, 1998 opinion states that the quoted language renders this statute inapplicable to enforcement of any Federally authorized programs, since “no immunity could be afforded from administrative, civil, or criminal penalties because granting such immunity would not be consistent with Federal law, which is one of the criteria for immunity.”

Therefore, EPA has determined that Virginia’s Privilege and Immunity statutes will not preclude the Commonwealth from enforcing its program consistent with the Federal requirements. In any event, because EPA has also determined that a state audit privilege and immunity law can affect only state enforcement and cannot have any impact on Federal enforcement authorities, EPA may at any time invoke its authority under the CAA, including, for example, sections 113, 167, 205, 211 or 213, to enforce the requirements or prohibitions of the state plan, independently of any state enforcement effort. In addition, citizen enforcement under section 304 of the CAA is likewise unaffected by this, or any, state audit privilege or immunity law.

IV. Statutory and Executive Order Reviews

A. General Requirements

Under the Clean Air Act (CAA), the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA’s role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely approves state

law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

B. Submission to Congress and the Comptroller General

The Congressional Review Act (CRA) (5 U.S.C. 801 et seq.), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. 5 U.S.C. 808(2). In taking action on this SIP revision, EPA already made such a finding. Thus, the SIP revisions announced in this notice became effective upon EPA's June 1, 2012 Letter Notice to Virginia. Today's administrative action simply codifies a provision which is already in effect as a matter of law in Federal and approved state programs. EPA will submit a report containing this action and other information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of this action in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

C. Petitions for Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [Insert date 60 days from date

of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action to codify in 40 CFR 52.2420(c) the administrative amendments approved by EPA through its June 1, 2012 Letter Notice to VADEQ may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone, Particulate matter, Reporting and record keeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 23, 2012.

W. C. Early,
Acting Regional Administrator,
Region III.

40 CFR Part 52 is amended as follows:

PART 52 - [AMENDED]

1. The authority citation for 40 CFR part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 et seq.

Subpart VV--Virginia

2. In § 52.2420, the table in paragraph (c) is amended by revising the entries for Sections 5-40-5810, 5-40-5820, 5-40-5850, 5-40-5880, 5-40-5920, 5-130-20 and 5-130-40. The amendments read as follows:

§ 52.2420 Identification of plan.

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(c) * * *

EPA-Approved Virginia Regulations and Statutes

State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
* * * *	* * *			
9 VAC 5, Chapter 40 Existing Stationary Sources [Part IV]				
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Part II Emission Standards				
* * * *	* * *			
Article 43 Municipal Solid Waste Landfills (Rule 4-43)				
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State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
5-40-5810	Definitions	8/17/11	6/1/12 by Letter Notice	The SIP effective date is 6/1/12
5-40-5820	Standard for air emissions	8/17/11	6/1/12 by Letter Notice	The SIP effective date is 6/1/12
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5-140-5850	Compliance	8/17/11	6/1/12 by Letter Notice	The SIP effective date is 6/1/12
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5-40-5880	Reporting	8/17/11	6/1/12 by Letter Notice	The SIP effective date is 6/1/12
* * * * *				
5-40-5920	Permits	8/17/11	6/1/12 by Letter Notice	The SIP effective date is 6/1/12
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9 VAC 5, Chapter 130 Regulations for Open Burning [Formerly 9VAC5 Chapter 40, Part II, Article 40]				
Part I General Provisions				
* * * * *				
5-130-20	Definitions	8/17/11	6/1/12 by Letter Notice	The SIP effective date is 6/1/12
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State citation	Title/subject	State effective date	EPA approval date	Explanation [former SIP citation]
5-130-40	Permissible open burning	8/17/11	6/1/12 by Letter Notice	The SIP effective date is 6/1/12
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[FR Doc. 2012-22207 Filed 09/10/2012 at 8:45 am; Publication Date: 09/11/2012]